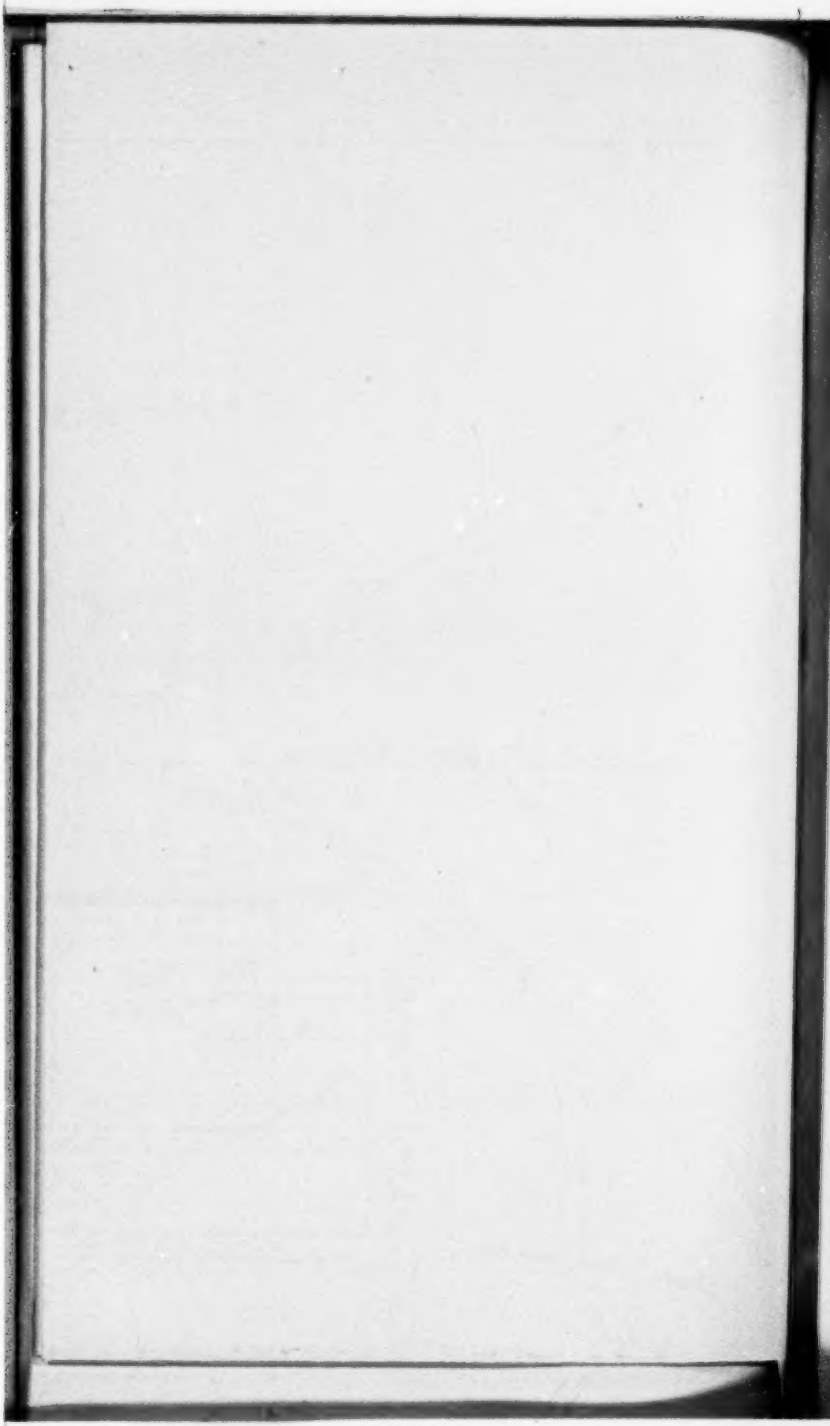

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IN THE

Supreme Court of the United States

No. 19.

ALEXANDER SPRUNT AND SONS, INC., ET AL., *Appellants*,
vs.
UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal From The District Court of The United States For The Southern District of Texas, Houston Division.

SUPPLEMENTAL BRIEF FOR THE INTERVENORS, ARKANSAS COTTON TRADE ASSOCIATION, ET AL., APPELLEES.

MART H. ROYSTON,
Counsel for Galveston Cotton Exchange, Intervenor.
C. B. COCHRAN,
Counsel for Oklahoma State Cotton Exchange, Intervenor.
ALBERT L. REED,
Counsel for Arkansas Cotton Trade Association and Texas-Oklahoma Compress and Warehouse Association, Intervenors.

Dated
Washington, D. C.,
November 11, 1929.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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May It Please the Court:

We have been served by counsel for the Appellants with a copy of their supplemental brief. In answer to the query made by the Court through Mr. Justice Brandeis, in which inquiry the following proposition,

to the best of our recollection, was propounded to counsel for the Appellants:

> What effect did the failure of the carriers to appeal from the decision of the court below have upon the rights of the Appellant shippers to maintain their action with regard to the rate prescribed by the Commission to remove the discrimination and preference previously found to exist?

In our original brief we presented to the Court all of our arguments concerning the validity of the Commission's order requiring the discrimination to be removed and also presented to the Court our contention that the Commission's utterances with regard to allowances related to a tariff interpretation question concerning which there was no necessity for an order on behalf of the Commission and concerning which the Commission in fact issued no order. We do not question the right of the Appellant shippers to maintain an action in any court contesting the validity of an order of the Commission requiring the removal of discrimination if in fact the Commission's order was made without evidence or was arbitrary or if there was some irregularity in the proceedings before the Commission or some error in the application of the rules of law. Neither do we question the right of the Appellant shippers to attack an order of the Commission if such order had been issued requiring the carriers to make allowances to some shippers and denying allowances to other shippers under similar circumstances and conditions. We do not understand that the Court's inquiry related to these two propositions just above outlined. Our understanding of the

Court's inquiry may be stated for the purpose of illustration as follows:

> "Assuming that the Commission's order requiring the discrimination and preference to be removed is a valid order, may these Appellants maintain their action in this Court with regard to the rate which the Commission prescribed for the purpose of removing the discrimination and preference since the common carriers affected by that rate have either accepted it as satisfactory to them or at least acquiesced in the Commission's order and published the rate for application to the traffic in question."

The legal right of the shipper under such circumstances is the right to pay no more than a just and reasonable freight rate. The act confers no right upon the shipper to have the rates initiated by any particular person. The Appellants apparently realized this to be the law for we find that at page 57 of their original brief a contention that the right of the shipper only existed as a consequence of the rights of the carrier. The question here presented by these Appellants, therefore, is this: We admit that we have no legal right to have the rate initiated by any particular method, but the carriers do have that right and the failure to exercise it, under the circumstances of this case, has caused legal injury to the rights of the Appellant shippers.

The circumstances of this case are these:

First, the Commission issued an order requiring the carriers to remove the undue preference found in the report to exist.

Second, this order left the method of removal to the voluntary action of the carriers.

Third, the carriers were unable, by reason of disagreements with other parties and by reason of an outstanding order of the Commission in another case, to voluntarily readjust the rates for the purpose of removing the discrimination and undue preference found by the Commission to exist.

Fourth, the carriers appealed to the Commission and asked the Commission to fix the exact rate necessary to remove the undue preference found by the Commission to exist.

Fifth, the carriers appeared before the Commission and introduced evidence for that purpose.

Sixth, the Commission, based upon the application of the carriers and based upon the evidence submitted by the carriers, fixed a rate for the purpose of removing the discrimination.

Seventh, the carriers appealed the Commission's decision fixing that rate to the Federal Statutory Court. That court found that the rate had been fixed upon the application of carriers and upon evidence submitted by the carriers to the Commission.

Eighth, the carriers, after the decision by the three-judge-court, abandoned their attack upon the Commission's order and have therefore accepted as satisfactory to the carriers the rate fixed by the Commission.

We assert that the position of the Appellants here is no different than if the carriers had in the first instance filed the rate with the Commission and the Appellants had gone direct into the court for the purpose of attacking the lawfulness of that rate.

A somewhat similar case from the standpoint of the facts was presented to this Court in the case of *United States v. Merchants and Manufacturers Traffic Association,* 242 U. S. 178. This Court, in that case held:

"While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least, in the absence of such participation. And if the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, Sections 13 and 15 afford ample remedy. Respondents contend that, after the amended order was entered and the tariffs filed, they did apply to the Commission for relief, 'but were denied the right of a hearing,' and that 'their protest and demand were ignored and denied.' What they did was to petition for a 'rehearing' in the proceedings under the 4th section, to which they now say they were not parties, instead of applying for redress under Section 13, as they had a legal right to do. *They mistook their remedy.* (Italics ours.) To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged unjust discriminations might result in creating infinitely more. The decree of the district court cancels the amended order and the tariff only so far as it concerns the four complaining cities, and thereby discriminates perhaps most unjustly in their favor as against the other 181 interior cities."

The distinction between that case and the instant case is found in this fact that in the *Merchants case, supra,* the Commission simply authorized the carriers to make advances in the shippers' rates. In the instant case the Commission fixed the exact rate which has been accepted by the carriers. But, nevertheless, the Commission has not yet passed upon the reason-

ableness of the rate and the Appellant shippers are before the Court in the first instance without first applying to the Commission to pass upon the reasonableness of the rate so fixed and so accepted by the carriers. We therefore contend that their position is no different from the position of the shippers before this Court in the case of *Texas and Pacific v. Abilene Cotton Oil Company,* 204 U. S. 426, and the position of the shippers in the long line of cases which have followed the principle therein established. In the *Abilene Cotton Oil case, supra,* the shippers attacked the rates of the carriers lawfully on file with the Commission as being unreasonable and discriminatory and otherwise unlawful. This Court held, although section 9 of the act specifically gave an alternative remedy of going to the Commission or the courts, that such alternative remedy was inconsistent with the act taken as a whole and that the courts could not pass upon such question without preliminary resort to the Commission. Appellants in the instant case now before this Court are in no different position. This Court cannot determine the legal rights of these Appellants without passing upon the reasonableness of the rate fixed by the Commission and accepted by the carriers. The Commission has not yet passed upon that question. The rights of these Appellant shippers, as established by the act, is to pay no more than a reasonable and just freight rate. If the rate fixed by the Commission and accepted by the carriers is just and reasonable, then no legal rights of these Appellant shippers have been violated. They have not yet sought, in the proper tribunal, a determination of the reasonableness or unreasonableness of the rate fixed by the Commission to remove the preference and discrimina-

tion found to exist. The Commission specifically stated that it did not pass upon that question. (R. 67)

In addition to the contention here made that the shippers cannot maintain this action, without first complaining to the Commission concerning the reasonableness of the rate, we contend that the Commission has been given authority by the Transportation Act of 1920 to fix rates for the specific purpose of removing discrimination. This contention is fully covered by our original brief, pages 75 and 76, to which reference is here made.

CONCLUSION.

We most respectfully submit that Appellants have not shown where they have sustained any legal inquiry by reason of the rate prescribed by the Commission and accepted by the carriers. That it is the rights of the carriers which are involved in the initiation of the rates and that the rights of the shippers are limited to the right to pay no more than a reasonable and just rate. This Court has held time without end, following the *Abilene Cotton Oil case, supra,* that it is the administrative function of the Commission to pass upon the reasonableness of freight rates and that preliminary resort must be had before the Commission before any action may be maintained in the courts.

The decision of the court below should be affirmed and the case dismissed, and it is so prayed.

Respectfully submitted,

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C. B. COCHRAN,
Counsel for Oklahoma State Cotton Exchange, Intervenor.

ALBERT L. REED,
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